Supreme Court, U. S.
FILED
MAR 7 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, on behalf of itself and its members-unit owners,
Petitioner,

versus

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,
Respondents.

PETITIONER FOR REHEARING

Law Office of Joseph S. Paglino
Counsel for Petitioner
88 N. E. 79th Street
Miami, Florida 33138
Telephone: (305) 758-8017

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

CERTIFICATE OF COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO: 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, on behalf of itself and its members-unit owners,
Petitioner,

vs.

HERBERT BUCKWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,
Respondents

Comes now undersigned counsel for Petitioner, Buckley Towers Condominium, Inc. and states that the Petition for Rehearing in this cause is not for purposes of delay, there being no stay or supersedeas in effect in this cause and that, in the view of Petitioner, there are serious and compelling questions of law to be decided in this cause which should be considered by this Court on rehearing.

Respectfully submitted:

Law Office of Joseph S. Paglino
Counsel for Petitioner
88 N.E. 79th Street
Miami, Florida 33138
(305) 758-8017

By:
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 15 day of March, 1977 to Darrey A. Davis, Esq., Steel Hector & Davis, 1400 S.E. 1st National Bank Bldg., Miami, Florida, Counsel for Respondents.

By: _____
Joseph S. Paglino, Esq.

INDEX

	PAGE NO.
Table of Authorities	iv
Statement	1
Argument in Support of Petition for Rehearing ..	2
Conclusion	9
Certification	11

TABLE OF AUTHORITIES

PAGE NO.

Burleigh House Condominium, Inc., etc., et al., vs. Herbert Buchwald, etc., et al., F. 2d (1977) 7

Buckley Towers Condominium, Inc., etc., et al., vs. Herbert Buchwald, etc., et al., 533 F. 2d 934 (5th Cir. 1976)..... 9, 10

Data Processing Service vs. Camp, 397 U. S. 150, 25 L. Ed. 2d 184. 90 S. Ct. 827 (1970)..... 6

Gulf Oil Corp. vs. Copp Paving Co., 419 U.S. 186, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974)..... 5

Hospital Building Co. vs. Trustees of Rex Hospital, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)..... 3, 4

Miller vs. Granados, 5th Cir. 1976, 529 F. 2d 393..... 8

Northern Pacific Railway Co. vs. United States, 365 U.S. 1, 78 S. Ct. 514, 2 L.Ed. 2d 545 (1958)..... 2

Warth vs. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)..... 6

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO: 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, on behalf of itself and its members-unit owners,
Petitioner

versus

HERBERT BUCKWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,
Respondents

PETITION FOR REHEARING

STATEMENT

Petitioner presented its case before this Court seeking review of an Order and Judgment rendered by the United States Court of Appeals for the Fifth Circuit. The broad issue concerned in the Petition turned upon standing to sue for relief under the Sherman Antitrust Act. Upon consideration by this Court of the Petition and Brief in Support of said Petition; Brief for Respondents in Opposition and Reply Brief of Petitioner, this Court concluded that the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed a dismissal for lack of standing, should not be disturbed. Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Powell would grant certiorari. In view of the apparent closeness of the question and because of the compelling nature and national application of the question, Petitioner respectfully requests a rehearing of its Petition.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

In its consideration of the Petition for Writ of Certiorari filed in this cause, Petitioner may not have presented forcefully enough or with sufficient persuasion the compelling and substantial reasons for the granting of the Writ.

Mr. Justice Black, delivering the majority opinion of this Court in *Northern Pacific Railway Co. vs. United States,* 365 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958) reexamined and restated the basic premise of the Sherman Act, *at 517.*

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, *while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. . .*" (Emphasis supplied)

Housing is a basic social necessity of life in this country and world wide. Human beings can no longer live in caves nor should they be cast in the streets as a result of victimization permitted by complicated and devious documentation such as the contractual obligations present in the instant case.

It is the expressed public policy of the United States of America, through its Congress, that the people of the United States enjoy as unfettered a right to housing as is possible. It has legislated to this effect: *42 U.S.C.A. 5301 Community Development.* The Act, among other noble purposes, seeks:

> Further achievement of the national housing goal of a decent home and suitable living environment for every American Family; 42 U.S. C.A. 5301 (d)(3).

In fact, housing is no less and possibly more of a necessity than hospitals. *Hospital Building Co. vs. Trustees of Rex Hospital,* 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976). Adverse effects upon commerce due to Sherman Act violations can arise as easily from violations concerning housing as from those concerning hospitals.

In *Hospital Building Co., supra,* this Court reviewed a dismissal on the pleadings in a case involving a Plaintiff Hospital which sought expansion from 49 beds to 140 beds and claimed damages and other relief for violation of the Sherman Act by the Respondent in that case, a private tax-exempt hospital. Petitioner in that case had suffered a dismissal on the pleadings, just as Petitioner in this case had suffered a dismissal on the pleadings, without an opportunity to present proofs of any kind and, in fact, having been denied, by Court Order, the opportunity to present evidence in support of standing and jurisdiction.

Petitioner in this case has over 560 dwelling units within its complex in addition to common element property.

Hundreds upon hundreds of thousands of dollars are involved in the operations, maintenance and commercial business dealings of Petitioner. Far more money than was involved in *Hospital Building Co., supra.*

The adverse effects upon commerce, and competition which Petitioner alleged in *Buckley Towers* are more severe than those alleged in *Hospital Building Co., supra.*

The pernicious effect of the Sherman Act impure 99 year "recreation lease" and other claimed Sherman Act violations, if proven, would clearly entitle Petitioner, Buckley Towers, to the relief requested in its complaint, on its own behalf.

Nor is there any question that Petitioner was created and exists solely and exclusively to represent its membership on a collective basis and to utilize the property rights and ownership interests granted to it in its covenant with its membership to protect the property and associational interests of itself and its membership to continue in existence.

Petitioner is a highly competitive and functioning business entity, competing in national markets for supplies and services.

Petitioner has more housing units and mandatory members than many towns and communities in the several states.

A continuing illegal conspiracy and contractual entanglement alleged by Petitioner to violate the Sherman Antitrust Act on a continuing basis result in a constantly in-

creasing financial burden imposed upon Petitioner by Respondents, which prevents Petitioner from allocating monies for expansion, purchase of needed supplies, repairs, etc., and unreasonably burdens commerce and deprives competitors of the Respondents in this cause from supplying such supplies and services to Petitioner.

Far from being a mere conduit, as concluded by the 5th Circuit without proof or trial, Petitioner has the sole responsibility to allocate funds, seek funds and expend funds in the flow of commerce to effectuate its chartered purposes.

Because of the pernicious effect of the 99 year lease agreement, with its constantly escalating rentals and other obligations, Petitioner and those entities with which it must deal, suffer on a constant and ever-increasing basis. Competition is restrained and Petitioner is personally and irreparably damaged. As long as the restraint imposed by the conspiracy and unwanted lease contract in question remains in effect, interest commerce is substantially and adversely affected.

Petitioner is entitled to, at the very least, state a claim and be given an opportunity to prove its claim of per se violations. *Gulf Oil Corp. vs. Copp Paving Co.*, 419 U.S. 186, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974).

Petitioner is the principle party to the illegal contract; its unit owners-members are guarantors of its obligations, but they do not engage in the business of running, expanding and maintaining a community of more than 1000 persons.

With its commercial shops, recreation areas, dwelling

units, business offices, self contained heating and cooling plants and other municipal-type accoutrements, Petitioner is clearly an entity entitled to standing on its own and, additionally, should be permitted to seek relief on behalf of its compulsory membership *since they have no other voice to speak on their behalf. Data Processing Service vs. Camp,* 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970); *Warth vs. Seldin,* 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

It is no answer to the horrendous and compelling situation in which Petitioner and its mandatory membership finds itself to tell Petitioner that it is a "mere conduit" for its unit owners-members and must constantly earn higher profits, and raise ever-escalating assessments against its unit owners-members to pay the newly arising illegal contract demands of respondents (a contract which is unwanted and serves absolutely no purposes or benefits to Petitioner or its unit owners that could not be obtained elsewhere for less than one-tenth of the costs imposed by the contract). The adverse effects upon commerce run into the millions of dollars and are far from unsubstantial.

Why should not Petitioner in *Rex Hospital, supra,* be forced to continually increase its charges to patients at the hospital in the manner in which Petitioner herein is forced to increase its charges rather than seek additional income through expansion? The answer lies in the practical realization that constantly increasing charges and assessments, like taxes, become confiscatory and reach a point beyond which they cannot be tolerated.

The point of extremis has been reached by Petitioner and it should be permitted standing to prove up its case in the

United States District Court in the same manner as any other litigant.

Petitioner is obligated on the 99 year recreation lease contract as a direct result of the machinations of respondents and it should be granted standing to sue respondents for the relief from the per se violations stated in its complaint.

Alternatively, the case should be remanded to permit Petitioner the right to present evidence in support of standing.

The decision of the Fifth Circuit, in denying standing to Petitioner has already resulted in harsh treatment of other condominium associations seeking relief for themselves and their membership from equally opressive Sherman Act violations. *Burleigh House Condominium, Inc., etc., et al., vs. Herbert Buchwald, etc., et al.,*—F. 2d—(1977) (Exhibit 1) and others which must now start their appellate review. See:

> Commodore Plaza at Century 21 Condominium Association, Inc., etc., vs. Saul J. Morgan Enterprises, Inc., Norman Cohen, individually and as trustee, David Morgan and Saul J. Morgan, individually and as trustee.
> Case No. 74-570-Civ-JE
>
> Condominium Association of Plaza Towers South, Inc., etc., vs. Plaza Recreation Development Corp., etc. and Plaza Building Corp., etc.
> Case No. FL-75-198-Civ-JE

Royal Bahamian Condominium Association, Inc., etc., vs. Saul J. Morgan, Trustee, Lake East, Inc., and View East, Inc., and Shores East, Inc., etc.
Case No. 75-934-Civ-CF

Villa Dorada Condominium Association, Inc. etc., Morton Wolf, individually and on behalf of others similarily situated, vs. Aventura-Villa Dorada, Inc., a Florida corporation, Arlen Realty and Development Corporation, a New York corporation doing business in New York & Florida individually, jointly and severally.
Case No. 76-1029-Civ-JE

etc.

There appears to be no question that the Fifth Circuit has accepted the proposition that the acts complained of in these series of cases involving condominium contracts, if proven, constitute *per se* violatioins of the antitrust laws of the United States. *Miller, et al. vs. Granados,* 5th Cir. 1976, 529 F. 2d 393.

If injunctive relief were granted to the plaintiff - petitioner condominium association, in its capacity as the party against which the illegal contracts are imposed and as the initial and primary target of the conspiracy, the injunctive relief would inure to each and every member since the enjoinment of the violations imposed by respondents would inure to the benefit of all. One injunction is as good as 1000 injunctions.

Conversely, of what benefit would an action by the individual membership of plaintiff-petitioner be to petitioner?

Petitioner would still be the primary obligor on the tied contract, thus spawning another series of litigation in the courts for determination of *its* liability as apart from the liability of its members.

Since petitioner has asserts it can be sued by respondents for damages as well as for specific performance. In fact, petitioner in this case *has been sued* in its corporate capacity and large damages recovered from it, as well as the imposition of injunctive relief against it compelling it to perform on the lease contract. (*Buckley Towers Condominium, Inc. vs. Buchwald, et al.,* 321 So. 2d 628 (Fla. 3DCA 1975). If petitioner can be sued by respondents to compel performance of the illegal contract, why can not petitioner sue to end the contract?

Denial of certiorari in this case sets a dangerous policy within the entire Fifth Circuit and elsewhere by giving notice to large entities that they may circumvent the antitrust laws insofar as the housing market is concerned by carefully drafting the contractual obligations to avoid standing to contest the violations by the entity charged with performance of the illegal contracts.

The "standing" question raised in this case is an artificial and illusory one and should be reversed by this Court.

CONCLUSION

Due to the questions of conflict and far reaching consequences of the case as presented in Petitioner's Brief in

Support of Certiorari and for the reasons and authorities of law cited in this Petition for Rehearing, which the Court or a member thereof, may have inadvertently overlooked in its denial of the Writ, Petitioner most respectfully requests that a rehearing be granted in this cause to review the Fifth Circuit's decision in *Buckley Towers Condominium, Inc., etc., et al., vs. Herbert Buchwald, etc.* et al., 533 F. 2d 934 (5th Cir. 1976).

Respectfully submitted:

Law Office of Joseph S. Paglino
Counsel for Petitioner
88 N.E. 79th Street
Miami, Florida 33138
Telephone: (305) 758-8017

By: _____
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that three copies of the foregoing Petition for Rehearing have been furnished to Darrey A. Davis, Esq., Steel Hector & Davis, 1400 S.E. 1st National Bank Bldg., Miami, Florida 33131, Counsel for Respondents, by mail, in accordance with Rule 33, this 15th day of March, 1977.

By: _____
Joseph S. Paglino, Esq.

APPENDIX A

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

BURLEIGH HOUSE CONDOMINIUM, INC., a non profit Florida Corporation, on behalf of itself and its membership, Plaintiff-Appellant,

v.

Herbert BUCHWALD, Individually, and as Trustee, and Burleigh House, Inc., a Florida Corporation for profit, Individually, jointly and severally, Honorable Robert Shevin, as Representative of the State of Florida, Defendants-Appellees.

No. 76-1847

United States Court of Appeals,
Fifth Circuit.

Jan. 26, 1977

A condominium association brought action for alleged violations of the Sherman Act. The United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., denied a motion to dismiss. The defendants appealed. The Court of Appeals held that the condominium association lacked standing to sue as a real party in interest under antitrust statutes.

Judgment vacated and case remanded for entry of order of dismissal.

Monopolies - 28(1.6)

Condominium association lacked standing to sue as real party in interest under antitrust statutes. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§1, 2; Clayton Act,§ 4, 15 U.S.C.A. §15.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

PER CURIAM:

Appellant, Burleigh House Condominium, Inc. a non-profit Florida condominium association, brought this action on behalf of itself and its membership against the developer, Burleigh House, Inc., and Herbert Buchwald, Trustee of the Burleigh House Condominiums for alleged violations of the Sherman Act, 15 U.S.C§§ 1 and 2. This cause went to trial and, at the close of the evidence offered by appellant, the district court granted appellee's motion for directed verdict. The condominium association appealed on several grounds but we will not reach those issues. This Court's primary concern is whether or not the condominium association has standing to sue as a real party in interest under 15 U.S.C. § 15. This question was raised by the appellees in their motion to dismiss filed March 4, 1975 which the district court denied.

In a case with remarkably similar facts and issues this court held that a condominium association lacks standing to maintain an action under the antitrust statutes. *Buckley*

Towers Condominium, Inc. v. Buchwald, 533 F.2d 934 (5th Cir. 1976).

Therefore, we vacate the judgment of the trial court and remand for entry of an order of dismissal.